

**Letter of Findings Number: 04-20110254**  
**Use Tax**  
**For Tax Years 2007-09**

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**ISSUE**

**I. Use Tax—Improvements to Realty.**

**Authority:** Ochs v. Tilton, 103 N.E. 837 (Ind. 1914); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; IC § 6-8.1-10-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-22](#); [50 IAC 4.2-4-10](#); Sales Tax Information Bulletin 60 (July 2006) 20060823 Ind. Reg. 045060287NRA.

Taxpayer protests the imposition of use tax.

**STATEMENT OF FACTS**

Taxpayer is a business with the principal function of a general contractor with operations in Indiana and throughout the United States. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on some taxable purchases. The Department therefore issued proposed assessments for use tax and interest for the tax years 2007, 2008, and 2009. Taxpayer protests that some of the items included as taxable are actually exempt as improvements to realty. Taxpayer also protests the imposition of interest and penalty. The Department did not impose penalty, therefore there is no penalty to waive. The Department is not permitted to waive interest, as provided by IC § 6-8.1-10-1(e). An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Use Tax—Improvements to Realty.**

**DISCUSSION**

Taxpayer protests the imposition of use tax on certain purchases which it believes are exempt from sales and use taxes. The Department based its conclusion that the items were taxable on the determination that the tangible personal property ("TPP") in question was not used as improvements to realty. Taxpayer disagrees on two categories. The first category includes TPP for dock levelers, bumpers, and truck restraints on Taxpayer's loading dock. The second category includes two underground fuel storage tanks and accompanying gas pumps. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

Taxpayer believes that the dock equipment and fuel tank systems qualify as items incorporated into realty as part of lump sum contracts. Sales Tax Information Bulletin 60 (July 2006) 20060823 Ind. Reg. 045060287NRA explains in relevant part:

If a construction contractor purchases construction materials pursuant to a lump sum contract, the construction contractor pays either: (1) sales tax at the time the construction materials are purchased, or (2) use tax at the time the construction materials are incorporated into real property if the contractor purchased or acquired the construction materials exempt from sales tax and the owner of the real property could not have purchased the materials exempt from sales tax.

This is supported by [45 IAC 2.2-4-22](#)(e), which states:

Disposition subject to the use tax. With respect to construction material a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:

- (1) He converts the construction material into realty on land he owns and then sells the improved real estate;
- (2) He utilizes the construction material for his own benefit; or
- (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

Also of relevance is [50 IAC 4.2-4-10\(d\)](#), which explains that dock levelers are considered personal property for real property tax purposes and that underground storage tanks are considered real property for real property tax purposes. Taxpayer refers to two Indiana Court of Appeals cases in support of its position that the dock levelers and underground storage tanks are incorporated into real property. Both cases deal with contract disputes in which the courts only mention the subject of real or personal property in the dicta of the opinions and do not otherwise discuss or determine any aspect of real or personal property.

Since there is an Indiana regulation directly on point regarding the tax status of these items, the Department is not convinced by Taxpayer's reference to the two cases from the Court of Appeals. The Department does find [50 IAC 4.2-4-10\(d\)](#) to be persuasive. Under that regulation, dock levelers and related items such as the bumpers and truck locks are personal property and are subject to sales or use tax. Based on the description provided, the underground storage tanks and related equipment are best categorized as improvements to real property. The tanks and equipment were intended to become a permanent addition to the land, were adapted to the use of the land, and cannot be easily removed from the land. See *Ochs v. Tilton*, 103 N.E. 837, 838 (Ind. 1914). The tanks and associated equipment are not subject to sales or use tax. Taxpayer has therefore met its burden under IC § 6-8.1-5-1(c) regarding the storage tanks and has not met its burden regarding the dock levelers, bumpers, and truck locks. As explained in the Statement of Facts above, there is no penalty to waive and the Department may not waive interest as provided by IC § 6-8.1-10-1(e).

#### **FINDING**

Taxpayer's protest is sustained in part and denied in part, as provided above.

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